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Supreme Court of the United States

No. 321

VICTORIA A. HART,
Appellant,

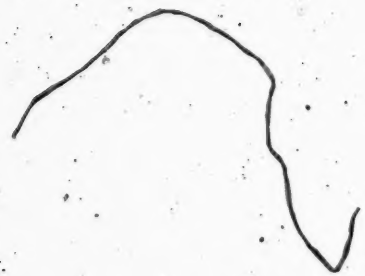
versus

DAVID W. HEDRICK, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., Debtor,
Appellee.

PETITION FOR WRIT OF CERTIORARI

VICTORIA A. HART
In Proper Person
Route 1
New Smyrna Beach, Florida,
Appellant,

DAVID W. HEDRICK, ESQ.,
Trustee
109 East Church Street
Orlando, Florida,
Appellee.



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3 Fla. Jur., Sec 44., pgs. 376 & 377 8

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11 U.S.C.A. 48 (*Bankruptcy Act*, Sec. 25) 2, 3, 4, 7, 8

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SUPREME COURT OF THE UNITED STATES

NO.

VICTORIA A. HART,

Appellant,

versus

DAVID W. HEDRICK, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., Debtor,

Appellee.

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINIONS

(a) The Order of the Honorable George C. Young, United States District Judge, United States District Court for the Middle District of Florida, dated November 23, 1966. (Appendix i)

(b) The Order of the Honorable George C. Young, United States District Judge, United States District Court for the Middle District of Florida, dated January 24, 1967. (Appendix ii)

(c) The Order of the Honorable Judge Phillips, of the United States Court of Appeals for the Tenth Circuit, sitting by designation on The United States Court of Appeals for the Fifth Circuit, entered March 8, 1967. (Appendix iii)

(d) The Order of the Honorable Bryan Simpson, Circuit Judge for The United States Court of Appeals for the Fifth Circuit, dated February 21, 1968. (Appendix iv)

STATEMENT OF GROUNDS FOR JURISDICTION

The cause of the Appellant is a matter from proceedings in bankruptcy and is a controversy arising in proceedings in bankruptcy under the provisions of 11 U.S.C.A., Secs. 47 & 48.

The case involves the newly adopted Federal Rules of Appellate Procedure, Rule 4(a), (Effective July 1, 1968), which supersedes the provisions of Section 25(a) of the Bankruptcy Act (11 U.S.C.A., Sec. 48) and its applicability to a cause presently pending in the Federal Courts.

There are special and important reasons for a review on certiorari for the Appellant, and others similarly situated, involving the question of excusable neglect.

(1) The Judgment sought to be reviewed was rendered and entered in the United States Court of Appeals for the Fifth Circuit on February 21, 1968.

(2) Several orders have recently been entered extending or modifying the time within which Appellant herein may file her Petition for Writ of Certiorari, to-wit:

(a) On May 22, 1968, an order was entered by the Honorable Hugo L. Black, Justice, extending the time to file Appellant's petition for writ of certiorari to and including July 20, 1968.

(b) On May 31, 1968, Justice Hugo L. Black modified the order of May 22, 1968, reducing the time to file a petition for writ of certiorari to and including July 1, 1968.

(c) On July 1, 1968, Justice Hugo L. Black further extended the time to file a petition for writ of certiorari to and including July 20, 1968.

(3) The statutory provisions involved in this Petition are as follows:

(a) 11 U.S.C.A., Secs. 47 & 48;

(b) Federal Rules of Civil Procedure, Rules 73(a) and 86(b);

(c) Federal Rules of Appellate Procedure, Rule 4(a);

(d) 11 U.S.C.A. foll. Sec. 53, General Order 36.

QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. I

Is the failure of the Appellant's then attorney of record to notify the Appellant of the entry of an order

within the 40-day appeal period allowed by the previous Bankruptcy Act, Section 25(a) (11 U.S.C.A., Section 48), excusable neglect with respect to the Appellant and others similarly situated?

QUESTION NO. II

Can the Supreme Court of the United States, in its discretionary powers, apply the rules relating to excusable neglect as contained in the Federal Rules of Civil Procedure, Rule 73(a), and the Federal Rules of Appellate Procedure, Rule 4(a) (Effective July 1, 1968), to prevent an injustice to the Appellant and others similarly situated, and permit an appeal and argument on the merits of the case?

Statement of The Constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves.

(d) The instant case involves the following:

(i) 11 U.S.C.A., Secs. 47 & 48, pgs 628 and 685 (See Appendix v.);

(ii) Fed. R.C.P., Rule 73(a), 28 U.S.C.A., Rule 73, p. 429 (See Appendix vi.);

(iii) Fed. R.C.P., Rule 86(b), 28 U.S.C.A., Rule 86, pgs. 567 & 568 (See Appendix vii.);

(iv) Federal Rules of Appellate Procedure, Rule 4(a), Colliers Bankruptcy Manual, Second Edition, pgs. A40, A41 and A42 (See Appendix viii.); and

(v) 11 U.S.C.A. Following Rule 53, General Order 36, p. 93 (See Appendix ix.).

STATEMENT OF CASE

This cause involves an amount in excess of $500.00, and is a controversy arising out of proceedings in bankruptcy.

On February 4, 1966, the Appellant filed an amended claim in bankruptcy in proceedings for reorganization in the amount of $197,496.39. On March 17, 1966, Alexander L. Paskay, Referee in Bankruptcy, entered an order disallowing Appellant's claim in toto. On March 29, 1966, the Appellant by and through her then attorney of record petitioned to review the Referee's order. On November 23, 1966, the Honorable George C. Young, United States District Judge, United States District Court for the Middle District of Florida, entered an order denying Appellant's petition for review (See Appendix i.). This order was filed the same day. The clerk mailed a copy of this order to the Appellant's then attorney of record.

Prior to the entry of the order referred to above, on October 18, 1966, the Appellant received a letter from her then attorney of record in which he referred to "Petition by Carl T. Langford, Trustee, for Examination of Designated Persons Under Section 21(a)" of the Bankruptcy Act (See Record, p. 100). The examination and the hearing referred to in the letter was scheduled November 2, 1966. This hearing had no bearing on the petition for review filed by Appellant's then

attorney of record, but merely indicated that her attorney would be unable to represent her at this particular hearing. The said attorney representing the Appellant did not in any wise indicate in said letter that he no longer represented Appellant with reference to her Petition for Review.

On Sunday, January 8, 1967, the Appellant received oral notice and information that the order of November 23, 1966, denying her Petition for Review had been entered. This oral information did not come from her then attorney of record.

Immediately thereafter, on January 9, 1967, the Appellant filed her notice of Appeal (See Record, p. 96) from the order of November 23, 1966, denying her Petition for Review to the United States Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

On January 16, 1967, the Appellant discharged her then attorney of record (See Record, pp. 97, 98 & 99) from any further services regarding her representation, and employed other counsel to represent her on appeal.

Subsequently, the Trustee filed a motion to dismiss the appeal in the United States Court of Appeals, Fifth Circuit. On March 8, 1967, the United States Court of Appeals, Fifth Circuit, entered an order stating that the motion to dismiss the appeal be carried with the case on the merits (See Appendix iii.). Counsel for the Appellant and Appellee then proceeded to prepare the entire record and briefs for the purpose of appeal.

On February 21, 1968, the United States Court of Appeals, Fifth Circuit, rendered a decision which held that the provisions of Section 25(a) of the Bankruptcy Act are mandatory and jurisdictional and dismissed the Appeal of the Appellant (See Appendix iv.).

It is from the ruling of February 21, 1968, of the United States Court of Appeals, Fifth Circuit, that this Petition for a Writ of Certiorari is brought.

ARGUMENT

The Appellant never received notice of the entry of an order of November 23, 1966, personally, until some 5 days after the time to appeal had expired. Her then attorney of record had been mailed a copy of the order but failed to notify her of its entry. Her then attorney of record had not filed before the Court any motion to withdraw, and at no time had he notified the Appellant that he did not represent her on her claim and Petition for Review. The Appellant was relying solely upon her attorney of record to advise her of the outcome of her Petition for Review which he had filed on her behalf in the lower court.

The Federal Courts, in most instances, have heretofore adopted the ruling of the United States Courts of Appeals for the Fifth Circuit and have held that former Section 25(a) of the Bankruptcy Act (11 U.S.C.A., Section 48) was mandatory and jurisdictional.

This hard and fast rule worked great hardship and brought grave injustice to many appellants, even though excusable neglect was present.

Throughout the entire Judicial System of the United States there has been an enlarging tendency to relax the harshness of this Rule. The Honorable George C. Young, United States District Judge in the Court below, indicated this tendency in his ruling on the Motion to Dismiss the Appeal filed by the Trustee (See Appendix ii.). His Honor recognized that the facts of this case could be grounds for excusable neglect, as permitted in criminal cases, and cited as authority for his position *Fallen v. United States*, 378 United States 139, 1964.

The Federal Rules of Appellate Procedure have been amended (Effective July 1, 1968) and now supersede Section 25(a) of the Bankruptcy Act (See Appendix viii.). The present rule now incorporates and embodies a fair procedure for extending the time in which a Notice of Appeal may be filed upon a showing of excusable neglect.

The Appellant, in the instant case, is caught in circumstances which unequivocably establish excusable neglect.

The State of Florida has long held that when a litigant is caught in circumstances similar to those faced by Appellant herein, relief can be obtained, and, in numerous instances, the Court has, in fact, set aside defaults and afforded relief to a party when his attorney has failed in his duties to a client.

In 3 Fla Jur 44, Attorneys at Law, Act or Neglect of Attorney, page 376 & 377, it is stated as follows:

> Further, it has been held that the court ought to be well satisfied before it closes its doors against a party on account of the negligence of his attorney, and that the court may relieve a party against the fault or neglect of his attorney where a clear failure of justice would otherwise result.

In an early Florida case an attorney had failed to answer a complaint on which a default was entered against his client. The Supreme Court of the State of Florida found that the client, relying upon his attorney of record, was not guilty of any gross negligence and that there was no neglect attributable to the client. The Court set aside the default upon the payment of costs. *Tidwell vs. Witherspoon,* 18 Fla. Supreme Court Reports, 282 (1881).

In a more recent case the Supreme Court of the State of Florida reversed the lower court which had dismissed a case with prejudice by virtue of the failure of an attorney to attend a hearing in behalf of his client. In reversing the decision of the lower court, the Florida Supreme Court had the following to say:

> We are not unmindful of the rule that counsel is the litigant's agent and that his acts are the acts of the principal, but since the rule is primarily for the governance of counsel, dismissal "with prejudice" would in effect punish the litigant instead of his counsel. *Beasley v. Girten,* 61 So.2d 179 (1952)

The United States Court of Appeals, Seventh Circuit, on an appeal from the United States District Court from a summary judgment dismissing the complaint in the lower court because the notice of appeal was not filed on time, reversed the lower court. It would appear in this case that the Federal Rules of Civil Procedure were adopted and amended during the pendency of the suit reducing the time in which an appeal could be taken from 3 months to 30 days. The Court of Appeals applied Rule 86(b), Federal Rules of Civil Procedure (See Appendix vii.), to the facts of this particular case, feeling that to apply the 30 day provision would work an injustice, and the Court reversed the lower court and remanded the case to be tried on the merits. *Preston v. Aetna Life Ins. Co.*, 174 F.2d 10 (1949).

It would seem that the reverse of the foregoing situation should also apply to the facts of the Appellant's case, when to apply the provision of the now effective Rule 4(a), Federal Rules of Appellate Procedure, would prevent an injustice and permit argument on the Appellant's cause in the United States Court of Appeals for the Fifth Circuit, on the merits of said cause.

This matter is urged to the Court by Appellant as a matter of grave and special importance, both to Appellant and to others similarly situated.

The Appellant further urges the Court to consider that she has a meritorious appeal, and that it should

be argued on its merits rather than be dismissed, when excusable neglect is evident.

Respectfully submitted,

_____

Victoria A. Hart,
In Proper Person

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Writ of Certiorari has been served on DAVID W. HEDRICK, ESQ., Trustee, 109 E. Church Street, Orlando, Florida, by mail this ____ day of July, 1968.

_____

Victoria A. Hart

APPENDIX

Appendix i.

ORDER DENYING PETITION FOR REVIEW

(Number and Title Omitted)

Filed: November 23, 1966

This matter comes on before the Court on the petition of Victoria A. Hart, claimant, for review of the Referee's Order of March 17, 1965 denying in toto the amended claim of Victoria A. Hart for $197,492.39.

Claimant Victoria Hart has alleged numerous technical and procedural errors, but basically three points are involved here on appeal: (1) Whether that portion of the amended claim of Victoria Hart filed on February 4, 1966 which had been previously filed as a claim by Victoria Hart on October 1, 1964 and then withdrawn should have been heard on the merits; (2) whether the petitioner had the burden of proving consideration for her claim; and (3) if so, whether the petitioner met that burden.

Victoria Hart on October 1, 1964 filed a claim for $57,692.45 (Claim No. 94). Such claim was derived from an assignment to her from her husband, Clyde E. Hart, of various amounts allegedly owed to him by the debtor corporation, of which he was the president and the largest stockholder. This claim did not include, and specifically deducted, the total of three promis-

sory notes ($139,799.94) given by the debtor corporation to Clyde Hart in partial satisfaction of the amount it owed him on open account.

The petitioner asserts that the Trustee thereafter stipulated that he would not object to the claim of the Bank of New Smyrna (Claim No. 42), if the petitioner would withdraw Claim No. 94. Claim No. 42 consisted of three promissory notes totalling $139,799.94. The alleged stipulation does not appear on the record, but the existence of such a stipulation may be inferred from the Referee's Order of November 1, 1965 in which Claim No. 42 was approved while Claim No. 94 was disallowed because Victoria Hart failed to appear.

Then, upon request of creditors, the Referee considered the approval of Claim No. 42 and ruled on February 4, 1966 that the claim of the Bank of New Smyrna would be disallowed in toto because the bank was merely acting as a collector of the notes. The Referee, however, permitted Victoria Hart, who was the apparent owner of the notes, to have one (1) day (until February 5, 1966) to submit an amended claim. In the same order, hearing was set on any objections to the amended complaint for February 15, 1966 (Ten days later).

Victoria Hart filed a timely amended claim in which she sought the original $57,692.45 for which she had filed a proof of claim on October 1, 1964, plus the $139,799.94 worth of promissory notes which had been the substance of the Bank of New Smyrna's claim, for a total of $197,492.39. This amended claim was disallow-

ed in its entirety by the Referee, and it is that disallowance that is here on review.

At the hearing on the amended claim, the Referee disallowed the amount of $57,692.45 as a new claim which his Order of February 4, 1966 had not authorized (page 25, 36 TR). The Referee ruled that only the amount of the promissory notes previously claimed by the Bank of New Smyrna was a timely claim. Petitioner alleges this disallowance to be erroneous.

An amended claim is not a new claim because there is a change in the amount of the claim. As long as the grounds for recovery are the same, the amended claim is proper. *Continental Motors Corp. v. Morris,* 169 F.2d 315 (10 Cir. 1948). Here, the Bank of New Smyrna was seeking to recover on promissory notes of which Clyde Hart was the payee. The ultimate issue, however, was whether there was consideration for the amount of the notes. Since the notes were made payable by a corporation to one of its officers, a person to whom they were negotiated would be an assignee rather than a holder in due course and would bear the burden of proving consideration. *Coconut Grove Exchange Bank v. Fleming Novalty Works,* 144 So. 337 (Fla. 1932). By allowing Victoria Hart to file an amended claim, the Referee was permitting her to establish the amounts the debtor owed her husband. The Referee himself indicated such at TR 23. Thus, the total amount of the amended claim should have been considered. Despite the aforesaid initial ruling of the Referee, he did permit the introduction of evidence of any amount owed by the debtor to Clyde Hart. As the

petitioner failed to prove consideration for any amounts on the open account of Clyde Hart, which would have been the basis of consideration for the notes and any other claim she could not be prejudiced by a disallowance as a matter of law of $57,692.45 of the alleged amount due on the account. The evidence presented by the claimant (testimony of the Trustee) was that the outstanding balance of the account of Clyde Hart through June 30, 1964 was approximately $146,000 (TR. 10, 11). The Referee found that none of this amount had been sufficiently proven by the claimant to be owing.

In his Order disallowing the claim, the Referee ruled that Victoria Hart had the burden of proving consideration for the amounts the debtor corporation allegedly owed her assignor, Clyde Hart. Clyde Hart was a director, officer, and large stockholder of the debtor. It is well settled that for Clyde Hart to have established the validity of the claim, he would have had the burden of not only proving the good faith of his transactions with the corporation, but also of showing their inherent fairness. *Goldie v. Cox,* 130 F.2d. 695, 699 (8th Cir. 1941). Victoria Hart, as assignee of one bearing this burden, likewise bore it; otherwise its effect could always be avoided through the use of a strawman.

The Referee's ultimate finding was that Victoria Hart had not met her burden of proof. The only witness for the claimant was the Trustee of the debtor. The Trustee, as custodian of the debtor's financial records, testified that the books of the corporation showed $146,263.18 to be the outstanding credit balance

on the account of Clyde Hart as the commencement of the Chapter X proceeding. He testified that the outstanding balance reflected loans by Clyde Hart to the corporation, the purchase price for equipment sold by Clyde Hart to the corporation, unpaid salaries due Clyde Hart from the corporation, and expenses of various kinds of the corporation paid by Clyde Hart. When asked twice by the Referee if the records were substantially correct, the Trustee answered in the affirmative both times:

REFEREE:

"1. You found evidence of debits and credits where funds were transferred from the Account of Clyde E. Hart to the account of Seminole?

TRUSTEE:

A. Yes, sir, and I checked enough of these deposits into the Bank of New Smyrna, to be satisfied that this account is substantially correct. I did not verify in detail every deposit, or every disbursement, but from random checks of the deposits and disbursements, I would say they are substantially correct." (TR. 13)

* * * * *

MR. CONKLIN:

"Q. Now, Mr. Langford, you have related to the Court a number of documents which you have found in the records as disclosed by this schedule or summary which has been filed

before the Court. Have you investigated all of the documents that appear in here?

A. No, sir, I testified that I have not. As I previously testified, I did enough spot checking to lead me to believe that they are substantially correct.

Q. That the records are substantially correct?

A. Yes, sir.

Q. And that they reveal the true and correct indebtedness due by the corporation to Clyde Hart?

A. I could not answer that, no, sir, because I have objected to the part of the claim in excess of $97,000, so I can't say." (TR. 44)

In denying the claim in toto, the Referee considered the silence of Clyde Hart. He ruled that Clyde Hart was a person who should have special knowledge of the consideration given for the notes and that since he was present at all times during the taking of testimony but did not testify, this fact could be used adversely against Victoria Hart.

This Court is unable to conclude that the Referee's findings were clearly erroneous, It is the duty of the rounding any claim in order to prevent injustice or fraud in the distribution of the bankrupt's assets. "This duty requires careful attention and special scrutiny when claimants are officers, directors or stockholders of the corporate bankrupt". *Spach v. Bryant,* 309 F.2d. 886, 888 (5th Cir. 1962)

As stated in *Pepper v. Litton*, 308 U.S. 295, 301:

> "Disallowance : . . may be necessitated by certain cardinal principles of equity jurisprudence. A director is a fiduciary. So is a dominant or controlling stockholder . . . Their powers are powers in trust. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged, the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmark of an arm's length bargain. If it does not, equity will set it aside."

The entries of the corporate books do not in themselves substantiate a claim by an officer-director-stockholder. *Spach v. Bryant*, 309 F.2d 886 (5th Cir. 1962). The Referee may properly doubt both the accuracy of the amount and nature of the transactions the entries represent. See *In Re Fergus Falls Woolen Mills Co.*, 41 F. Supp. 355, 363 (D. Minn., 1941), aff'd. 127 F. 2d 491; Koufopantelis v. CIA, De Nov. San George, S.A., 291 F.2d 709, 713-14 (20 Cir. 1961) (Concurring opinion of J. Waterman).

In the instant case, the trustee testified that he believed the entries to be "substantially correct", but

admitted that his knowledge was based only on "random checks" of deposits and disbursements. Further, it is apparent the trustee could not have known solely from a check of deposits and disbursements whether entries on the books had been adjusted to present a distorted picture. For example, a cash deposit intended as a contribution to capital could be credited to the depositor's open account so that the books would reflect a corporate indebtedness to the depositor. Likewise, salaries, bonus payments, and corporate expenses credited to Hart's account could or could not be reasonable and fair. See *Levine v. Johnson,* 287 F. 2d 623 (5th Cir. 1961). It was the burden of the claimant to prove the consideration; the Referee found she had failed to meet that burden. This Court holds the Referee's finding is supported by substantial evidence and in accord with applicable law; therefore, it is,

ORDERED and ADJUDGED that the Referee's Order of March 17, 1965 be and is hereby affirmed and the petition of the claimant Victoria Hart be and is hereby dismissed.

DONE and ORDERED in Chambers at Orlando, Florida, this 23rd day of November, 1966.

(Signed) GEORGE C. YOUNG
UNITED STATES DISTRICT JUDGE

Appendix ii.

ORDER

(Number and Title Omitted)

Filed: January 24, 1967

This cause came on for hearing pursuant to due notice on the motion of the trustee to dismiss the appeal of Victoria A. Hart on the grounds that a notice of appeal was filed approximately seven (7) days after the time for filing such notice had expired.

Counsel for the trustee contends that the time set forth in Section 25(a) of the Bankruptcy Act is absolutely jurisdictional and inflexible. Since the time had expired within which the appeal could be taken the trustee's position is that the Court of Appeals has no jurisdiction to consider the appeal and that the District Court, therefore, has jurisdiction to dismiss Victoria A. Hart's notice of appeal.

The record reflects that Victoria A. Hart has filed a claim which, having been denied by the Referee, was submitted to this Court on a petition for review and that on November 23, 1966, this Court entered an order affirming the Referee and dismissing the petition for review. A copy of that order was forwarded by the Clerk of this Court to the then counsel of record for Victoria A. Hart, but by affidavit now filed, Victoria A. Hart claims that she was not advised by her counsel of this Court's action adverse to her until January

8, 1967, and that thereafter she immediately, on the following day (January 9, 1967) filed in proper person her notice of appeal. It appears to this Court that there may be grounds for excusable neglect which would permit an extension of time for the filing of the appeal in this case as in criminal cases. See Fallen vs. United States, 378 U.S. 139 (1964). This would result in jurisdiction remaining with the Court of Appeals to determine in the first instance whether it has jurisdiction. Consequently, this Court can not have concurrent jurisdiction to decide this issue with the Court of Appeals. It is, therefore

ORDERED that the motion to dismiss the appeal is dismissed for lack of jurisdiction in this Court to consider it.

DONE and ORDERED in Chambers at Orlando, Florida this 24th day of January, 1967.

(Signed) GEORGE C. YOUNG
UNITED STATES DISTRICT
JUDGE

Appendix iii.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.

VICTORIA A. HART,

Appellant,

versus

CARL T. LANGFORD, Trustee in Bankruptcy of SEMINOLE PARK AND FAIRGROUNDS, INC., Debtor,

Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before PHILLIPS*, COLEMAN and SIMPSON, Circuit Judges.

BY THE COURT:

On consideration of the motion of appellee to dismiss the appeal filed in the above styled cause, and of appellant's argument and brief in support of the appeal filed in opposition thereto,

IT IS ORDERED that the motion to dismiss the appeal be hereby carried with the case on the merits.

(ORIGINAL FILED - MARCH 8, 1967)

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*Of the Tenth Circuit Sitting by Designation

Appendix iv.

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 24,547

VICTORIA A. HART,

Appellant,

versus

DAVID W. HEDRICK, Trustee in Bankruptcy of SEMINOLE PARK AND FAIRGROUNDS, INC., Debtor,

Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(February 21, 1968)

Before COLEMAN and SIMPSON, Circuit Judges, and DAWKINS, District Judge.

SIMPSON, Circuit Judge: The question here is whether this Court has jurisdiction to consider an out-of-time appeal in bankruptcy. Mrs. Hart is appealing from the disallowance of her amended claim in the

amount of $197,492.39 against the bankrupt, Seminole Park and Fairgrounds, Inc. Carl T. Langford was initially the trustee in bankruptcy. By order of the district court, the present trustee was subsequently substituted.

Mrs. Hart filed her amended claim on February 4, 1966. On March 17, 1966, after hearing, the referee in bankruptcy denied the amended claim. On petition for review the district court affirmed the referee by a written order dated November 23, 1966. No formal entry of this order was made, but copies were mailed to all attorneys of record. Notice of appeal to this court was filed by Mrs. Hart, in proper person, on January 9, 1967. On January 13, 1967, the trustee filed with the district court a motion to dismiss the appeal as untimely. The district court denied this motion on January 24, 1967, stating his view that it was for this court to decide in the first instance whether jurisdiction exists to consider the appeal. We agree.

On March 9, 1967, the trustee filed with this court a motion to dismiss the appeal. Another panel of this court ordered that motion carried with the case on the merits. Submitted to us for decision are the question of jurisdiction and (if jurisdiction exists) the merits of the appeal. Our consideration of the first question leaves us with the firm conviction that we do not have jurisdiction to hear the appeal. Accordingly, we dismiss the appeal as time-barred, and do not reach the merits of the case.

Section 25(a) of the Bankruptcy Act, 11 U.S.C., Sec. 48(a), is controlling as to timeliness. That section provides:

> "(a) Appeals under this title to the United States courts of appeals shall be taken within thirty days after written notice to the agrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry."

It is undisputed that the forty-day provision is applicable to the case sub judice. Forty-seven days elapsed from the date the district court affirmed the referee's order (November 23, 1966), and the date notice of appeal to this court was filed by Mrs. Hart (January 9, 1967).

The provisions of Section 25(a) of the Act are mandatory and jurisdictional. *Dupont v. Okeechobee County, Florida*, 5 Cir. 1953, 135 F.2d 577, cert. den. 320 U.S. 751; *Klein v. Rancho Montana DeOro, Inc.*, 10 Cir. 1959, 263 F.2d 764; *In re 1934 Realty Corp.*, 2 Cir. 1945, 150 F.2d 477, cert. den. 326 U.S. 734.

Our attention has been directed to several cases which hold that failure to comply strictly with the provisions of the Bankruptcy appeal statutes may in certain circumstances be disregarded upon a showing that this is necessary to avoid "an extremely harsh" result. *Reconstruction Finance Corp. v. Prudence Securities*

Advisory Group, 311 U.S. 581, 61 S.Ct. 332, 85 L.Ed. 364; *Furman v. Anderson*, 5 Cir. 1959, 272 F.2d 934; *Mario Mercado E. Hijos v. Feliciano*, 1 Cir. 1958, 260 F.2d 500. These cases are inapposite for two reasons.

First, none of them involves a situation where, as here, neither a notice of appeal nor a motion for leave to appeal was filed during the critical forty-day period. In each notice of appeal was filed within the forty days, but proper procedure under the last sentence of Section 24(a) of the Bankruptcy Act, 11 U.S.C., Section 47(a)[1] was by motion to the Court of Appeals for leave to appeal rather than by filing notice of appeal in the district court. This was so because each of the appeals in question involved less than $500. (See footnote 1, supra). The cited decisions allowed this irregularity to be overlooked upon a showing of "special equity". A brief quotation from the First Circuit case, *Feliciano, supra*, illustrates the principle involved:

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[1] "The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however*, That the jurisdiction upon appeal from a judgment, on a verdict rendered by a jury shall extend to matters of law only: *And provided further*, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

"However, as we pointed out in Benitez v. Ferran's Estate, 1 Cir., 1944, 143 F.2d 435, 436, in view of the decision of the Supreme Court in R.F.C. v. Prudence Securities Advisory Group, 1941, 311 U.S. 579, 61 S.Ct. 331, 85 L.Ed. 364, we are bound to hold that this failure to file in the court of appeals a petition for allowance of appeal is merely 'a procedural irregularity rather than a jurisdictional defect, and we have power to allow the appeal, treating the notice of appeal filed in the court below as an informal substitute for the application to us.' In view of the fact that the bankruptcy proceedings now pending in the district court will probably be impeded by the presentation of the claims of other to a 'right of reversion' similar to that asserted by the present appellant, it seems that a 'special equity' exists which should move this court to exercise its discretion to treat the notice of appeal as an informal, irregular application for leave to appeal. Consequently we now grant leave to appeal; and without further reference to our appellate jurisdiction we proceed to a discussion of the merits of the case." 260 F.2d at 502-503.

It seems clear to us that Mrs. Hart is entitled to no relief under this line of authority.

Secondly, assuming arguendo the applicability of the cases last cited, there is no sufficient showing by appellant that a "special equity" exists. The only cir-

cumstance advanced by Mrs. Hart is that her previous attorney, Millard B. Conklin, notified her by letter dated October 18, 1966, that he was withdrawing as counsel in the instant case. Mrs. Hart says she understood the letter to mean that she would nevertheless be kept informed as to any further order of the district court in the pending bankruptcy proceedings, specifically that she would be told if and when the district court affirmed the referee's order, as it did on November 23, 1966. She received no such notification from Mr. Conklin.

We hold that we are barred from considering this appeal by the mandatory time requirements of Section 25(a) of the Bankruptcy Act. If there is any relief available to Mrs. Hart it lies elsewhere, not here. We express no opinion as to her right to proceed against Mr. Conklin.

APPEAL DISMISSED

Appendix v.

11 U.S.C.A., Secs. 47 & 48, pgs. 628 and 685.

Sec. 47. Jurisdiction of appellate courts.

(a) The United States courts of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final,

and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500.00, an appeal therefrom may be taken only upon allowance of the appellate court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. July 1, 1898, c. 541, Sec. 24, 30 Stat. 553; May 27, 1926, c. 406, Sec 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; June 25, 1948, c. 646, Sec 39, 62 Stat. 992; July 7, 1952, c. 579, Sec. 9, 66 Stat. 423.

Sec. 48. Practice on appeals

(a) Appeals under this title to the United States courts of appeals shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service, or, if such notice be not served and filed, then within forty days from such entry.

Appendix vi.

28 U.S.C.A., Rule 73, pg. 429.

Rule 73. Appeal to a Court of Appeals.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed.

Appendix vii.

U.S.C.A. 28, Rule 86, p. 567

Rule 86. (b) Effective Date of Amendments.

The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on Septem-

ber 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies. Added Dec. 27, 1946, effective March 19, 1948.

Appendix viii.

Federal Rules of Appellate Procedure, Rule 4(a), Colliers Bankruptcy Manual, Second Edition, pgs. A40, A41 and A42.

(a) *Appeals in Civil Cases.*

. . . Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it should be made by motion with such notice as the court shall deem appropriate.

Appendix ix.

11 U.S.C.A. following Sec. 53, General Order 36, page 93.

Order 36. Appeals

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States.

FILED
AUG 5 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 321

VICTORIA A. HART,

Petitioner,

vs.

DAVID W. HEDRICK, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., Debtor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, DAVID W. HEDRICK, TRUSTEE IN BANKRUPTCY OF SEMINOLE PARK AND FAIRGROUNDS, INC., DEBTOR

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August 2, 1968

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OPINIONS BELOW

The opinion of the District Court (App. i of Petitioner) has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (App. iv of Petitioner) is reported at 390 F.2d 10.

JURISDICTION

The jurisdictional requisites have been sufficiently set forth in the Petition.

QUESTION INVOLVED

Did the Circuit Court err in finding an appeal time barred when not filed within the statutory 40 days limit set forth in 11 USCA Sec. 48 and the sole equitable argument against following the statute was that Petitioner had no personal knowledge of entry of order of District Court, although her attorney of record was duly served with such Order?

STATUTES AND RULES INVOLVED

The pertinent portions of 11 USCA Sec. 47 and Sec. 48, General Order No. 36, FRCP 73(a) and Rule 4(a), Federal Rules of Appellate Procedure are set forth in the Appendix to the Petition.

28 USCA Sec. 2075 reads as follows:

"§2075. *Bankruptcy rules*

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Added Pub. L. 88-623, § 1, Oct. 3, 1964, 78 Stat. 1001."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is substantially correct except in two important particulars:

1. That after receipt of the letter of October 18, 1966, from her then attorney of record, she secured another attorney, Mr. Ralph Clayton, who appeared for her at the special hearing in question. (Stipulation between attorneys for Petitioner and Respondent dated June 30, 1967, and filed in the Circuit Court.)

2. The Fifth Circuit not only held the statutory appeal time to be mandatory and jurisdictional, but in the alternative found that even if it had jurisdiction that "there is no sufficient showing by appellant that a 'special equity existed.'"

ARGUMENT

The issue in this case is one which is extremely narrow and is not one warranting review by this Court. It involves a unique combination of law and the facts personal to Petitioner which have been resolved against her and are not apt to affect litigants in the future. The Referee and the District and Circuit Appellate Courts rightly and correctly determined the matter. This bankruptcy matter, which does directly affect many other persons and public opinion concerning the bankruptcy system, should be finally put to rest.

1. The Decision Below Is Clearly Correct.

(a) Statutory Limitation Is Mandatory and Jurisdictional.

It is uncontested that Sec. 25(a) of the Bankruptcy Act (11 USCA 48) sets the appeal time at 40 days for this case and that the appeal was not filed until 47 days after the entry of the order appealed from. The Circuit Courts of Appeal have unanimously found that such limit was mandatory and jurisdictional. Petitions for Certiorari were filed in many of the cases and this Court has consistently denied all of them.

See: *Broders* v. *Lage*, 25 F. 2d 288 (C.A. 8, 1928); *Siegel* v. *Margiotta*, 102 F. 2d 525, 526 (C.A. 2, 1939); *Matter of Country Club Bldg. Corp.*, 128 F. 2d 36 (C.A. 7, 1942); *Hyman* v. *McLendon*, 102 F. 2d 189 (C.A. 4, 1939), Cert. denied, 60 S. Ct. 74, 308 U.S. 563, 84 L. Ed. 472; *U. S.* v. *East*, 80 F. 2d 134 (C.A. 8, 1935); *Peterson* v. *Baker*, 168 F. 2d 684 (C.A. 8, 1948); *Roberts* v. *Bank of America Nat. Trust & Sav. Ass'n*, 198 F. 2d 919 (C.A. 9, 1952); *Casalduc* v. *Diaz*, 117 F. 2d 915 (C.A. 1, 1941), certiorari denied, 62 S. Ct. 74, 314 U.S. 639, 86 L. Ed. 512; *Schreiner* v. *Farmers' Trust Co. of Lancaster*, 91 F. 2d 606 (C.A. 3, 1937), certiorari denied, 58 S. Ct. 36, 302 U.S. 686, 82 L. Ed. 530; *Dupont, et al.* v. *Okeechobee County, Fla.*, 135 F. 2d 577 (C.A. 5, 1943), certiorari denied, 64 S. Ct. 56, 320 U.S. 751, 88 L. Ed. 447; *In re Aqua Hotel Corporation*, 251 F. 2d 138, 143 (C.A. 9, 1957), Cert. denied, 356 U.S. 965, 2 L. Ed. 2d 1072, 78 S. Ct. 1005; *In re Evansville Television, Inc. & Schepp, et al.* v. *Producers, Inc., et al.* 286 F. 2d 65 (C.A. 7, 1961), Cert. denied 81 S. Ct. 1048, 366 U.S. 903, 6 L. Ed. 2d 204.

It is true that in most cases Rule 73(a) FRCP would permit the District Court to extend the time of appeal up to 60 days upon a showing of excusable neglect. This rule

has been in effect since 1948 during the time when many of the above cases were decided and were thus considered by all such courts and this court on the various applications for certiorari.

This Court by General Order 36 made the rules governing appeals in civil actions applicable to appeals in bankruptcy—*"except as otherwise provided in the act."* The act sets a definite time limit (40 days) and a procedure for a shorter period (30 days), but no provision for any extension beyond 40 days. It covers the subject fully just as Rule 73(a) does. To allow Rule 73(a) to be considered as adding to the provisions of the act concerning the time for appeal would be contrary to the language of the statute and to this Court's language, intent and all previous cases on the subject.

It is also true that this Court has now promulgated a new set of rules governing all appeals in the future and that Rule 4(a) of the Federal Rules of Appellate Procedure will affect all bankruptcy appeals *after* July 1, 1968. These rules were adopted by the specific statutory authority (only adopted in 1964) which gave this Court specific authority to promulgate rules which would supersede the terms of the bankruptcy statute as to procedural matters only. See 28 USCA 2075. Not until the adoption by this Court of these rules had the statutory limitation ever been changed or construed other than that of being mandatory and jurisdictional.

(b) No Sufficient Showing of Excusable Neglect.

In the event this Court should feel that the Circuit Court should have considered the matters set forth by Petitioner, Respondent asserts that the Court did give consideration to such matters and found them lacking in

merit. The only excuse advanced by Petitioner for not filing the Notice of Appeal on time was that she personally was not aware that the lower court's order had been entered and that her then attorney of record had not kept her fully advised (R. 98). She did not say that she had directed him to appeal if the order was adverse or any other facts which would constitute grounds for equitable relief—*even if such relief were possible.* In fact, her whole behavior and the history of her claim, considering the attempt to have the Bank of New Smyrna collect the principal part of the claim (R. 33-38), indicates this approach to be a questionable attempt to impugn the character and professional ability of her former attorney. She was not unfamiliar with lawyers and legal proceedings. She had been involved in the instant proceedings for over two years and had procured another attorney to represent her at the special 21(a) hearing. (Stipulation in Circuit Court dated June 30, 1967.) No possible facts or theory sufficient to warrant any thought of departure from the set rule have been advanced.

Petitioner was fully heard and lost out on the merits of her case before the Referee and on appeal to the District Court. She has thus had two full opportunities to be heard on the merits of the case. The denial of further appeal under these circumstances is not as unjust as Petitioner would attempt to make it be.

2. There Is No Important Question of Federal Law.

As pointed out in previous argument, since the adoption of Rule 4(a) of the Federal Rules of Appellate Procedure, the question has become moot and no longer will have any importance to anyone other than the present litigants. It is merely a further attempt to secure review of rulings Petitioner disliked in the three prior tribunals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Writ of Certiorari should be denied.

Respectfully submitted,

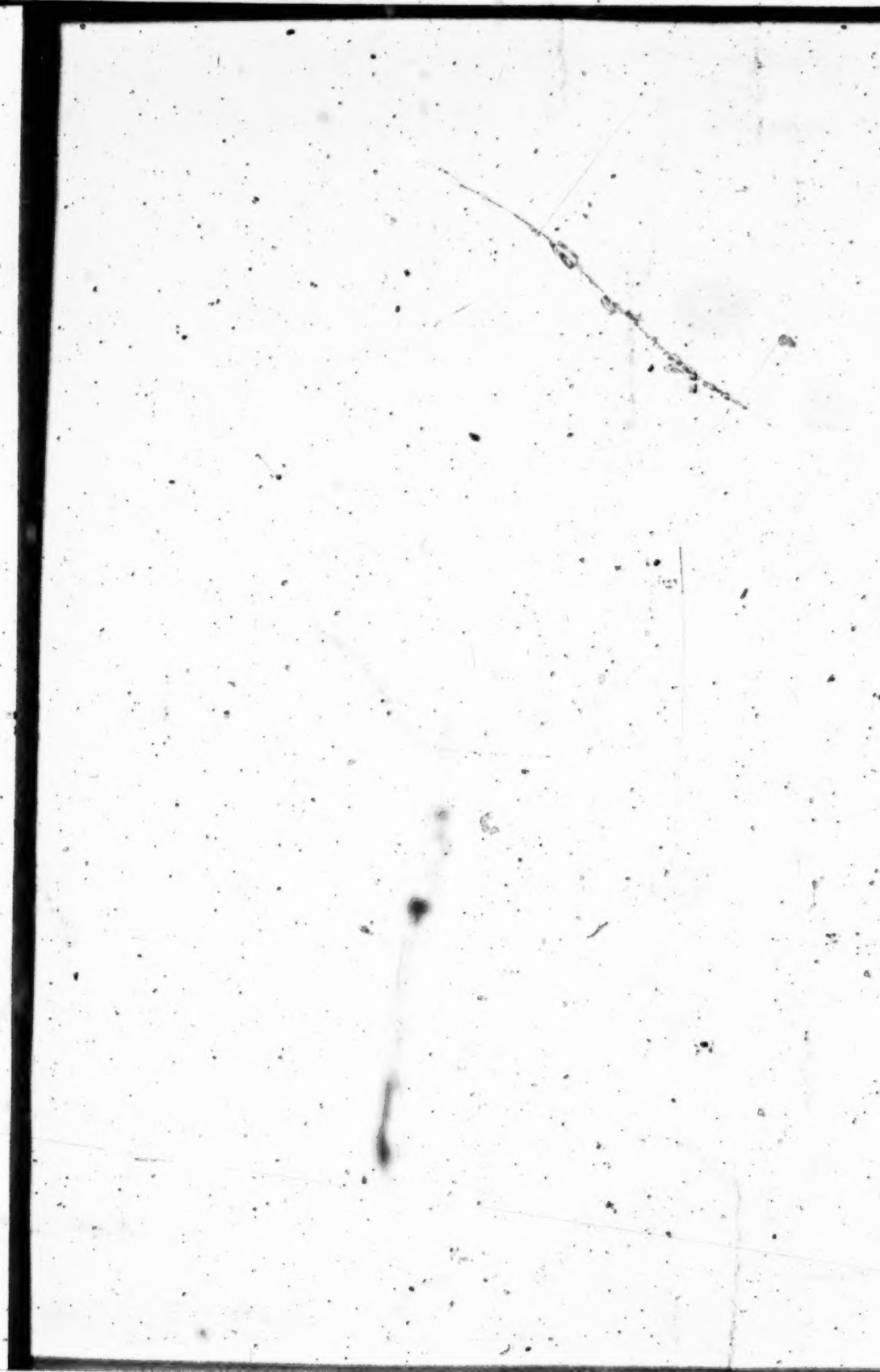
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August 2, 1968

PROOF OF SERVICE

I, DAVID W. HEDRICK, one of the attorneys for David W. Hedrick, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., debtor, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of August, 1968, I served a copy of the foregoing Brief on Victoria A. Hart, Petitioner herein, by mailing a copy in a duly addressed envelope, with postage prepaid to Victoria A. Hart, Route 1, New Smyrna Beach, Florida.

DAVID W. HEDRICK
OF GILES, HEDRICK & ROBINSON
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Supreme Court of the United States

October Term, 1968

No. 321

VICTORIA A. HART,

Appellant,

versus

DAVID W. HEDRICK, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., Debtor,

Appellee.

PETITION FOR REHEARING ON APPELLANT'S PETITION FOR WRIT OF CERTIORARI

VICTORIA A. HART
Route 1
New Smyrna Beach, Florida,
Appellant,

DAVID W. HEDRICK, ESQ.,
Trustee
109 East Church Street
Orlando, Florida
Appellee.

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 321

VICTORIA A. HART,

Appellant,

versus

DAVID W. HEDRICK, Trustee in Bankruptcy of Seminole Park and Fairgrounds, Inc., Debtor,

Appellee.

PETITION FOR REHEARING ON APPELLANT'S PETITION FOR WRIT OF CERTIORARI

The Appellant presents this, her Petition for Rehearing on the Petition for Writ of Certiorari, based upon the following grounds:

FIRST. After review of the Record, counsel for the Appellant has determined that the Court may have been misled in its findings by the wording of the order of the Honorable Bryan Simpson, Circuit Judge, United States Court of Appeals, 5th Circuit, dated February 21, 1968 (*Appendix iv., pages 23 through 28, inclusive*), in reference to the letter received by the Appellant from her then attorney of record. Judge Simpson construed the letter as notification to the Appellant that her then attorney was withdrawing from the instant case. The letter, however, by its terms, could only be

notice that her attorney would not appear at a particular unrelated hearing, and could not in any wise be construed as being a withdrawal of counsel from the case (*Record, pages 100 & 101*).

SECOND. Counsel for the Appellant strongly urges to the Court, contrary to the Appellee's position, the importance of a determination of the question presented by her appeal, both to present litigants and appellants and future litigants and appellants, under the Federal Rules of Appellate Procedure.

This Court is well aware of the fact that from time to time the procedural rules are changed or amended, which changes affect the rights of present and future litigants. Multitudinous cases have arisen where the Court has had to determine the rights of litigants in the application of a new or amended rule to a cause then pending before the Court.

The cause of the Appellant was pending at the time and on the date that Section 25(a) of the Bankruptcy Act was amended by Rule 4(a), Federal Rules of Appellate Procedure, granting to appellants the right to establish excusable neglect and extend the time for filing their notice of appeal.

It is apparent that from time to time in the future, changes in the Rules will be made which will affect the rights of future litigants that may then be caught in the same or similar circumstances as the Appellant.

Therefore, it is the position of the Appellant that the

question of whether or not a change in the appellate procedure which affects the rights of present litigants and which will arise in the future under any subsequent changes in the rules, should apply immediately, upon the effective date, to a cause then pending before the Court.

The Appellant feels, that to prevent a harsh result and grave injustice, a decision should be made by this Court to determine this question for the Appellant and others similarly situated, and all future litigants. It is further urged that this is a question which should be resolved relating to and for the interest of the entire American Bar.

THIRD. The Appellant requests the Court to reconsider its previous Order, to issue the Writ, and to require a full scale Certiorari proceeding with oral argument on the question presented by this appeal.

Respectfully presented.

JAMES H. TUCKER
Attorney for Appellant
213 Silver Beach Avenue
P. O. Box 3065
Daytona Beach, Florida

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Petition for Rehearing on Appellant's Petition for Writ of Certiorari is confined to intervening circumstances of substantial or controlling effect, or to other substantial grounds available to Petitioner although not previously presented, and that said Petition for Rehearing is presented in good faith and not for delay, and that the same is restricted to the grounds above specified.

James H. Tucker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Rehearing on Appellant's Petition for Writ of Certiorari has been served on DAVID W. HEDRICK, ESQ., Trustee, 109 E. Church Street, Orlando, Florida, by mail this ____ day of November 1968.

James H. Tucker